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No. 80-1832

In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE UNITED STATES HOUSE OF REPRESENTATIVES TO DISMISS

EUGENE GRESSMAN,
Special Counsel,
U.S. House of Representatives,
School of Law, University of North Carolina,
Chapel Hill, N.C. 27514.
(919) 962-5106

QUESTION PRESENTED

The question presented by this motion to dismiss is whether an agency of the United States has standing to appeal to this Court under 28 U.S.C. § 1252, which permits "any party" to appeal from a federal court judgment holding an Act of Congress unconstitutional, where

(a) The federal agency was a prevailing party respondent in an administrative review proceeding in which a federal court of appeals invalidated an Act of Congress,

(b) The federal agency joined with the private party petitioner in urging the invalidity of the statute, thereby eliminating any adverseness between the parties on the constitutional question, and

(c) The federal agency claims no grievance as to the form, scope or content of the judgment of unconstitutionality, or as to the relief granted by the court.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Ninth Circuit: (1) Jagdish Rai Chadha, an appellee herein; (2) the Immigration and Naturalization Service, the appellant herein. At all times the Immigration and Naturalization Service has been represented by Department of Justice counsel.

Amici curiae before the Ninth Circuit, by invitation of the court: (1) the United States House of Representatives; (2) the United States Senate.

Intervening parties after judgment of the Ninth Circuit: (1) the United States House of Representatives; (2) the United States Senate. As a result of

such intervention, which was granted by the Ninth Circuit, both the House and the Senate are appellees in the instant appeal. See Appendix G of jurisdictional statement, p. 75a. Each House is also filing a petition for certiorari addressed to all the rulings of the Ninth Circuit in this case.

Authorization to intervene on behalf of the House of Representatives was granted to the Speaker of the House by H. Res. 49, 97th Cong., 1st Sess., unanimously agreed to on January 29, 1981, 127 Cong. Rec. H 260 (Jan. 29, 1981, daily ed.). The full text of H. Res. 49 is as follows:

H. RES. 49

IN THE HOUSE OF REPRESENTATIVES, U.S.,
January 29, 1981.

Whereas, on February 27, 1978, a brief amicus curiae was submitted on behalf of the Chairman of the Committee on House Administration in the United States Court of Appeals for the Ninth Circuit in the case of Chadha v. Immigration and Naturalization Service, No. 77–1702, in support of the constitutionality of the legislative review provision in section 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. 1254(c)(2), and on December 22, 1980, the Court of Appeals ruled that this legislative review provision violated the principle of separation of powers and was unconstitutional, and the Department of Justice, although it prevailed before the Court of Appeals, has filed a notice of appeal to the Supreme Court;

Whereas, the United States Court of Appeals for the District of Columbia Circuit is now considering the case of Consumer Energy Council of America et al. v. Federal Energy Regulatory Commission, Nos. 80–2184 and 80–2312 wherein the Department of

Justice has submitted a brief amicus curiae urging that the legislative review provisions of section 202 of the Natural Gas Policy Act, 15 U.S.C. 3342, are unconstitutional, and the Attorney General has suggested that the House submit a brief amicus curiae in support of these legislative review provisions;

Whereas, it is essential that the House be given an opportunity to present fully its views to the appropriate court in both of these cases, either as amicus curiae or by intervention as a party: Now, therefore, be it

Resolved, That the Speaker is authorized to retain counsel and take any steps he considers necessary, including intervention or submission of briefs amicus curiae, to protect the interests of the House before the court in the case of Chadha v. Immigration and Naturalization Service and in the case of Consumer Energy Council of America et al. v. Federal Energy Regulatory Commission.

Attest:

[SEAL] EDMUND L. HENSHAW, Jr.
Clerk.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Pursuant to Rule 16.1, the appellee United States House of Representatives moves to dismiss the appeal filed on behalf of the Immigration and Naturalization Service (hereinafter "INS"). The motion is grounded on the fact that the INS is one of the prevailing and non-aggrieved parties below, in a proceeding in which there was no adverseness whatever between the parties. The INS therefore has no standing to invoke this Court's appeal jurisdiction under 28 U.S.C. § 1252.

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. § 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an Act of Congress unconstitutional in any civil action, suit,

or proceedings to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. . . ."

STATEMENT

The jurisdictional problem posed by the INS appeal to this Court is the culmination of the following procedural developments in the Ninth Circuit:

1. In March of 1977, the appellee Chadha filed in the Ninth Circuit a petition for review of a final deportation order issued against him by the INS. The petition named only the INS as respondent, and was filed pursuant to Section 106(a) of the Immigration and Nationality Act of 1952.

2. The petition for review did not question the propriety or legality of the deportation order. Indeed, Chadha at all times has conceded that he is deportable under Section 241(a)(2) of the Act.[1]

3. The sole question presented by Chadha's petition for review was the alleged unconstitutionality of Section 244(c)(2) of the Act, which has nothing to do with the propriety of issuing orders of deportation. Rather, it deals with the important sovereign problem of waiving deportation of an illegal alien, mainly on grounds of "extreme hardship," and allowing such alien to reside permanently in the United States. Section 244(c)(2) prescribes the Congressional procedures for making the final determination respecting such a waiver. A waiver is possible on a discretionary basis only for those deportable aliens who have ap-

[1] Section 241(a)(2) directs the Attorney General to deport any alien who "is in the United States in violation of this chapter." Chadha had been admitted in 1966 as a nonimmigrant student for a limited period only. Having remained in the United States beyond the statutorily prescribed time limit, Chadha became subject to deportation. Chadha concedes he is deportable. See J.S.App. B, p. 65a; J.S.App. D, p. 70a.

plied for and secured from the INS a temporary suspension of deportation, pending Congressional consideration of the matter. Under Section 244(c)(2), either House of Congress can disapprove a waiver; or, if neither House disapproves, the waiver is effective and the alien's status changes to that of a permanent resident alien. In Chadha's case, the House of Representatives on December 16, 1975, disapproved a waiver and the granting to Chadha of permanent residence status. 121 Cong. Rec. 40800. That action, of course, reactivated and finalized the original and uncontested INS order of deportation.

4. Thus it was the discretionary action of the House in disapproving a change in Chadha's deportable status that motivated Chadha's constitutional assault on the Section 244(c)(2) legislative procedures. But Chadha made no claim that Section 244(c)(2) infringed any constitutional or statutory right or privilege that Chadha himself might possess. Instead, Chadha's constitutional complaint was and is that, by enacting the legislative procedures of Section 244(c)(2), Congress exceeded its own constitutional power to legislate and intruded into powers vested exclusively in the Executive Branch. More particularly, as expressed in Chadha's main brief in the Ninth Circuit, the constitutional arguments there advanced were:

> (a) Neither the power to regulate naturalization nor the Necessary and Proper Clause empowers Congress to act in contravention of other provisions in the Constitution;
>
> (b) What Chadha called the "Congressional veto," as provided for in Section 244(c)(2), violates the separation of powers doctrine;
>
> (c) What Chadha called the "Congressional veto" deprives the President of the opportunity

to exercise his veto power under Article I, Section 7; and

(d) What Chadha also called the "one-House veto" provision of Section 244(c)(2) violates the requirement of a bicameral legislature.

5. The INS responded in the Ninth Circuit with a brief that totally agreed with Chadha's constitutional objections to Section 244(c)(2), while adding a few refinements thereto. The brief (p. 7) candidly acknowledged that the INS, as respondent, "agrees with petitioner [Chadha] that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional." The brief then proceeded to make the following constitutional points:

(a) Section 244(c)(2) violates the Article I procedures for enactment of the laws of the United States;

(b) Section 244(c)(2) is an intrusion into executive and judicial powers and functions, all in violation of the separation of powers doctrine; and

(c) Section 244(c)(2) is severable from other provisions of the Act.

6. In addition to the complete agreement between the parties as to the alleged unconstitutionality of Section 244(c)(2), Chadha and the INS were also in agreement in the Ninth Circuit as to what the appropriate relief should be. In the words of the INS brief (p. 36), "this Court should set aside the [INS] order for petitioner's deportation." Setting aside the deportation order carries the necessary implication that the INS, or the Attorney General, will cease and desist from all efforts to deport Chadha.

7. As a result of the opening briefs of the two parties in the Ninth Circuit, it was evident that (a) both parties were in agreement with respect to the

only issue in the review proceeding, i.e., the alleged unconstitutionality of the Section 244(c)(2) procedures, (b) both parties were in agreement as to the appropriate form of relief, (c) the constitutional issue was framed and argued by both parties in terms of a confrontation between the constitutional functions of the Legislative and Executive Branches, and (d) viewing Section 244(c)(2) as an epitomization of that inter-Branch conflict, the Executive Branch (acting through the INS and the Attorney General) was unwilling and incapable of defending the constitutionality of Section 244(c)(2). The Ninth Circuit, perceiving this lack of adverseness between the two parties on a momentous constitutional issue, invited the House of Representatives and the Senate to appear as *amici* to defend the constitutionality of the Section 244(c)(2) procedures. The invitations were accepted, and special counsel were retained to make the defense.

8. Congressional *amici* briefed and argued the constitutional issues. The *amici* also urged various prudential, procedural and jurisdictional reasons why the constitutional issues should not and need not be reached. But the Ninth Circuit rejected all those threshold contentions. See J.S.App. A, pp. 4a–24a. In this Court, the INS jurisdictional statement (at pp. 6–7, n. 6) expresses total satisfaction with the Ninth Circuit's disposition of the threshold matters.

9. On the basic constitutional issue, the Ninth Circuit held that the Section 244(c)(2) procedures violate the separation of powers doctrine, as Chadha and the INS had argued. And in ordering the Attorney General to cancel Chadha's deportation order and to cease and desist from taking steps to deport Chadha based on the House resolution, the Ninth Circuit gave the very relief that both Chadha and the INS had

sought. Needless to say, the INS jurisdictional statement in this Court questions none of the constitutional rulings or rationale of the Ninth Circuit; nor does it question any part of the relief given by the Ninth Circuit.

10. In all respects, the decision of the Ninth Circuit established both the appellee Chadha and the appellant INS as the prevailing and winning parties. There were no losing parties, no aggrieved parties, before the court. Chadha, being totally satisfied with the decision, has not sought further review by this Court. The INS, although equally satisfied, has apparently taken an appeal in order to secure this Court's stamp of approval on the Ninth Circuit's ruling.

11. The only truly aggrieved entities are now the House of Representatives and the Senate. But in the proceedings leading to the Ninth Circuit decision, the House and Senate participated only as *amici*, not as adverse parties. Their intervention subsequent to the decision was not designed as a retroactive investiture of adverseness in parties or issues prior to the decision. Intervention was sought and granted solely to give the two Houses standing to protest the Ninth Circuit's ruling. That protest includes the objection that the absence of adverse parties before the Ninth Circuit drained the proceeding of an essential Article III "case or controversy" requirement.

ARGUMENT

1. AS A PREVAILING AND NON-AGGRIEVED PARTY, THE INS LACKS STANDING TO INVOKE APPEAL JURISDICTION PURSUANT TO SECTION 1252

This Court has no jurisdiction under Section 1252 to entertain an appeal by a non-aggrieved party from a decision of a court of appeals invalidating a federal

statute. Since the appellant INS is a prevailing party as to all aspects of the decision below, and asserts no grievance before this Court, its appeal should be dismissed.

The unarticulated premise of this attempt to invoke Section 1252 is the notion that, since Section 1252 literally permits "any party" to the proceeding below to take an appeal, the putative appellant need not be aggrieved. But that notion is contradicted by the long-established rule of federal appellate practice that "a party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980), and authorities there cited.

This aggrieved-party rule is not rendered inapplicable simply because a jurisdictional statute uses the term "any party." While there are no recorded precedents on point under Section 1252, the rule has consistently been applied by this Court to reject appeals sought by non-aggrieved parties pursuant to Section 1253. That section permits "any party" to appeal to this Court from three-judge court orders granting or denying injunctions.[2] Yet this Court has always insisted that the party invoking Section 1253 be aggrieved in some way by the decision below. See *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206 (1939) ("the successful party below has no standing to appeal from the decree denying the injunc-

[2] The term "any party" was inserted into what is now Section 1253 in the 1948 recodification of the Judicial Code. Previously, this jurisdictional provision had stated that "an appeal may be taken directly to the Supreme Court." See 36 Stat. 557 (1913); 43 Stat. 938 (1925); 50 Stat. 753 (1937). And see *Perez* v. *Ledesma*, 401 U.S. 82, 84 n. 1 (1971), where the Court, in summarizing Section 1253, referred to "an aggrieved party" being eligible to take an appeal thereunder.

tion"); *Gunn* v. *University Committee,* 399 U.S. 383, 390 n. 5 (1970) ("the appellants could not appeal from an order in their favor"); *Perez* v. *Ledesma,* 401 U.S. 82, 87 n. 3 (1971) ("a successful party . . . cannot appeal [under § 1253] from its victory").

The words "any party" also appear in the certiorari statute, Section 1254(1), which provides that cases in courts of appeals may be reviewed by writ of certiorari granted upon "the petition of any party to a civil or criminal case, before or after rendition of judgment or decree." Those words were added to the statute in 1911 not to permit certiorari to be sought by a party who prevailed in a court of appeals but merely to make clear something that had not previously been clear—that the United States, as a losing and aggrieved party in a criminal case in a court of appeals, could seek certiorari review by this Court. *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 545 (1925).

Certiorari has yet to be granted on the petition of "any party" who is totally satisfied with a court of appeals ruling.[3] Even the Solicitor General has doubted "whether a completely victorious party in the court of appeals may seek certiorari."[4] To permit that would violate the basic rule of appellate practice that precludes further appeals by successful parties below. The seeming applicability of that rule to Sec-

[3] The reference to "any party" in § 1254(1) has been given literal application in those rare but important instances where, the losing party in the district court having docketed an appeal in a court of appeals, the winning party in the district court then seeks certiorari before judgment of the court of appeals. See, *e.g.*, *United States* v. *Nixon,* 418 U.S. 683, 686–687 (1974).

[4] Memorandum for the United States in Opposition (p. 2) to petition for certiorari in *Data Products Corp.* v. *United States,* No. 74–854, certiorari dismissed, 420 U.S. 967 (1975), cited and discussed in R. Stern & E. Gressman, *Supreme Court Practice* 58–59 n.8 (5th ed. 1978).

tion 1254(1) would also preclude resort by the INS to the Section 2103 provision that if an appeal is improvidently taken from a decision by a federal court of appeals, the appeal papers shall be treated as a petition for certiorari. If a successful party cannot appeal, neither can he seek certiorari.

Nothing in *United States* v. *Lovett,* 328 U.S. 303, 306–307 (1946), cited in the INS jurisdictional statement (at 12–13, n. 9), suggests that a prevailing governmental party is entitled to file a petition for certiorari, let alone take an appeal. The *Lovett* case came to this Court from the Court of Claims, pursuant to a jurisdictional statute whereby only the United States or the claimant in that court can file a petition for certiorari.[5] The Solicitor General had supported the three claimants in the Court of Claims in their challenge to the constitutionality of an appropriation statute that forbade payment of compensation to the three government employee claimants; special counsel for the Congress appeared as *amici* in the Court of Claims to defend the constitutionality of the statute.

After the Court of Claims held the statute unconstitutional, the Solicitor General filed a petition for certiorari "because of the Government's belief that

[5] At the time of the *Lovett* case, the relevant jurisdictional statute was § 3(b) of the Act of Feb. 13, 1925, 43 Stat. 939 (as amended by the Act of May 22, 1939, 63 Stat. 753). Section 3(b) provided: "In any case in the Court of Claims . . . it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned . . ." In the 1948 recodification of the Judicial Code, 62 Stat. 928, this provision assumed its present form as 28 U.S.C. § 1255. Section 1255 reads in pertinent part: "Cases in the Court of Claims may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted on petition of the United States or the claimant; . . ."

important constitutional issues are involved and because *amici curiae,* representing the Congress, having no access to this Court, requested that a petition for writs of certiorari be filed." Brief of the United States, p. 2. No one questioned or protested the Solicitor General's filing in terms of the Government's non-aggrieved status. And the filing was largely an accommodation for the Congressional *amici* who had no other "access to this Court." In any event, the Court's opinion in *Lovett* did not discuss or resolve the jurisdictional propriety of the filing. Its precedential value is limited to the highly unusual facts and circumstances there present.

A fair conclusion is that the aggrieved-party rule of appellate practice has been superimposed on all jurisdictional statutes, including Section 1252, that authorize "any party" to seek review in this Court. The INS jurisdictional statement does not address, let alone refute, this aggrieved-party requirement.[6] Instead, it submerges into a footnote (n. 9 at 12–13) two counterproductive contentions relative to compliance with Section 1252:

(1) The belief is expressed that INS may appeal under Section 1252, despite its position on the constitutionality of Section 244(c)(2), since the Ninth Circuit rendered judgment "against the INS" and ordered the Attorney General "to cease and desist from taking any steps to deport appellee Chadha." But that was precisely the judgment and order that the INS, along with Chadha, fought to secure. And that is

[6] In the "Jurisdiction" section of the jurisdictional statement (at 2), citation is made to *Parker* v. *Levy*, 417 U.S. 733, 742–743 n. 10 (1974), the only prior instance of a Section 1252 appeal from a court of appeals ruling invalidating a statute. But the governmental appellants in that case were truly aggrieved by the appellate court's invalidation of certain Articles of the Uniform Code of Military Justice.

precisely the judgment and order that INS would have this Court affirm.

(2) The INS also claims that its appeal serves the purpose of Section 1252, which is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." *McLucas* vs. *DeChamplain,* 421 U.S. 21, 31 (1975). But that purpose is not advanced or even served when the governmental parties abandon any defense of an Act of Congress and prevail in their attack upon the validity of the statute.

Clearly, it is the "holding of unconstitutionality" that triggers a Section 1252 appeal. And it is the "holding of unconstitutionality" that must create an appealable grievance on the part of the losing party. In the normal situation, given the Executive duty to defend Congressional statutes, the United States or an officer thereof will be the prime losing party. But this is not a normal case.

What we have here is a historically unique situation not contemplated by the language or purpose of Section 1252. By attacking rather than defending the constitutionality of Section 244(c)(2) of the Immigration and Nationality Act, the INS lacks any grievance stemming from the "holding of unconstitutionality." The INS thus needs no quick access to this Court, the quick access that Section 1252 was designed to provide.

To insist that a Section 1252 appellant be a party aggrieved by the holding of unconstitutionality is to serve the real purpose of this jurisdictional statute. So far as the words "any party" are concerned, they draw meaningful content from the fact that more than one party may be aggrieved by such a holding. Thus when the Government intervenes in a private action in which the constitutionality of an Act of Congress is

drawn in question, see 28 U.S.C. § 2403(a), at least one of the private litigants is apt to be aligned with the Government in defense of the constitutionality of the statute. In that event, both the Government and the private litigant could appeal under Section 1252 from an adverse ruling. See, for example, *United States* v. *Bekins*, 304 U.S. 27 (1938).

In sum, the INS as a prevailing and non-aggrieved party has no standing to appeal under Section 1252.[7]

2. THIS COURT HAS NO JURISDICTION OVER AN APPEAL FROM A HOLDING OF UNCONSTITUTIONALITY WHERE THE PARTIES BELOW WERE IN TOTAL AGREEMENT AS TO THE UNCONSTITUTIONALITY OF AN ACT OF CONGRESS

The jurisdictional defect in the INS appeal runs deeper than the absence of any grievance that would entitle the INS to invoke Section 1252. The root of the defect is in the fact that both parties to the litigation lacked any adverseness between them on any issue at stake in the Ninth Circuit review proceedings. Both were in total agreement in urging (a) the unconstitutionality of Section 244(c)(2), and (b) the cancellation of the INS order that Chadha be deported.

From every standpoint, the review proceedings were devoid of what *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), described as "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." There literally was no case

[7] Section 1252 has twice been marked for extinction. The proposed Supreme Court Jurisdiction Acts of 1978 and 1979 (S. 3100, 95th Cong., 2d Sess., and S. 450, 96th Cong., 1st Sess.) would have excised Section 1252 as unnecessary. See S. Rep. No. 95-985; S. Rep. No. 96-35; Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A.J. 1325, 1326 (1979); Note, *Section 1252: A Jurisdictional Dinosaur*, 75 Nw.L. Rev. 175 (1980).

or controversy between Chadha and the INS respecting the constitutionality of Section 244(c)(2) or the relief to be had upon a holding of unconstitutionality. Both agreed that Congress, in enacting Section 244 (c)(2), had intruded not upon any rights or privileges of Chadha but upon the powers thought to be constitutionally and exclusively vested in the Executive Branch of the Government. The real controversy, in short, was between the Executive Branch and the Legislative Branch, which is what the separation of powers doctrine is all about.

Once it became clear that Chadha was limiting his complaint about the deportation order to an assertion that Congress had invaded the powers and functions of the Executive Branch, the INS as an Executive Branch agency had no difficulty in joining Chadha in such a constitutional assault upon the powers of Congress. The difficulty is that such complete agreement between the parties as to the sole issue in the proceedings, particularly an issue of constitutional dimensions, deprives the proceedings of the adverseness so essential to an Article III "case of controversy."

This appeal must suffer the fate of the appeal brought here in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 47–48 (1971):

> At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside. We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat* v. *United States*, 219 U.S. 436 (1911).... *Dismissed.*

To paraphrase the *Moore* holding, we are here confronted with the anomaly that both litigants (Chadha and the INS) desire precisely the same result, namely a holding that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional. The proceedings here are no more of a case or controversy than the proceedings in *Moore*.

It is no answer to this Article III problem that the House of Representatives and the Senate participated in the Ninth Circuit proceedings as *amici curiae*. Their adversary presentation of the constitutional issues was done in the capacity of friends of the court, not as litigating parties. The requisite adverseness must be as between parties to the proceedings, not between the parties and the *amici*.

Nor can it be said that intervention by the House and Senate, following the Ninth Circuit's holding of unconstitutionality, retroactively invested the prior proceedings with the necessary adverseness. The intervention was sought and obtained solely to have standing to object in this Court to such matters as the lack of adverseness between the parties supposedly in litigation before the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the appeal docketed by the INS should be dismissed. All the questions arising out of the Ninth Circuit's opinion, including the question put in the INS jurisdictional statement, are presented in the two petitions for certiorari filed herewith by the House of Representatives and the Senate.

Respectfully submitted.

EUGENE GRESSMAN,
Special Counsel,
U.S. House of Representatives,
School of Law, University of North Carolina,
Chapel Hill, N.C.

JUNE, 1981.

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